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Nos. 80-2070; 81-24

IN THE

Supreme Court of the United States

October Term, 1981

SUMITOMO SHOJI AMERICA, INC.,
Petitioner,

v.

LISA M. AVIGLIANO, DIANNE CHENICEK, ROSEMARY T. CRISTOFARI, CATHERINE CUMMINS, RAELLEN MANDELBAUM, MARIA MANNINA, SHARON MEISELS, FRANCES PACHECO, JOANNE SCHNEIDER, JANICE SILBERSTEIN, REIKO TURNER and ELIZABETH WONG,
Respondents.

LISA M. AVIGLIANO, DIANNE CHENICEK, ROSEMARY T. CRISTOFARI, CATHERINE CUMMINS, RAELLEN MANDELBAUM, MARIA MANNINA, SHARON MEISELS, FRANCES PACHECO, JOANNE SCHNEIDER, JANICE SILBERSTEIN, REIKO TURNER and ELIZABETH WONG,
Cross-petitioners,

v.

SUMITOMO SHOJI AMERICA, INC.,
Cross-respondent.

ON WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

BRIEF AMICUS CURIAE OF SHELL PETROLEUM N.V.

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January 18, 1982

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PRELIMINARY STATEMENT

Shell Petroleum N.V. ("SPNV") files this amicus brief with the consent of both parties in order to put before the Court

certain views with respect to the standing of a wholly owned United States subsidiary of a Japanese parent company to assert the rights conferred on a Japanese company by Article VIII(1) of the Treaty of Friendship, Navigation and Commerce between the United States and Japan to engage executive personnel of its choice. That question was ruled upon by the Second Circuit in *Avigliano v. Sumitomo Shoji America, Inc.*, 638 F.2d 552 (2d Cir. 1981), and the Fifth Circuit in *Spiess v. C. Itoh & Co. (America), Inc.*, 643 F.2d 353 (5th Cir. 1981). SPNV files this amicus in protection of certain rights conferred on it by the Treaty of Friendship, Commerce and Navigation between the United States and the Kingdom of The Netherlands signed at The Hague, March 27, 1956, 8 U.S.T. 2643, T.I.A.S. No. 3942. SPNV does not support either party to this action.

INTEREST OF AMICUS CURIAE

Shell Petroleum N.V. ("SPNV") is a company organized under the laws of the Kingdom of The Netherlands with certain subsidiary corporations operating in the United States. SPNV holds certain rights vested in it by the Treaty of Friendship, Commerce and Navigation between the United States of America and the Kingdom of The Netherlands, signed at The Hague, March 27, 1956, 8 U.S.T. 2043, T.I.A.S. No. 3942 ("the Netherlands FCN Treaty") which may be affected by the decision herein.

SPNV has its principal place of business in The Hague. Sixty percent of the equity shareholdings in SPNV are held by N.V. Koninklijke Nederlandsche Petroleum Maatschappij (Royal Dutch Petroleum Company), a company incorporated in The Netherlands. The remaining forty percent equity shareholding in SPNV is held by The "Shell" Transport and Trading Company, Limited, a company incorporated in England. SPNV and an affiliated Royal Dutch/Shell company hold investments in over 900 Royal Dutch/Shell companies located in over 100 countries.

SPNV includes among its holdings approximately 69% of the outstanding shares of common stock of Shell Oil Company

("Shell Oil"), a Delaware corporation with its principal office in Houston, Texas. SPNV also owns, indirectly, all the shares of stock of Scallop Nuclear Inc. ("Scallop Nuclear"), a Delaware corporation with offices in New York.

As a foreign parent company enjoying certain treaty rights under the Netherlands FCN Treaty, SPNV has a special interest in the standing issue presented in this case. The United States has entered into Friendship, Commerce and Navigation Treaties with numerous countries. Those Treaties define varying specific substantive rights and, with similar variation, vest those rights, *inter alia,* in foreign "nationals", foreign "companies", "enterprises" controlled by foreign companies, "enterprises" in which foreign nationals hold an interest and other entities. As a foreign parent company protected by one of such Treaties, SPNV believes that it can present views not heretofore expressed which may be of use to the Court in resolving the standing issue presented.[1]

SUMMARY OF ARGUMENT

The various substantive provisions of the many Friendship, Commerce and Navigation Treaties vest substantive rights in various entities, including nationals of the Treaty parties, companies of the Treaty parties, enterprises controlled by nationals and companies of the Treaty parties and enterprises in which such companies or nationals have substantial interests. The entities on which the rights are conferred vary among the various substantive provisions. To determine whether it is appropriate to treat a United States subsidiary as entitled to assert the Treaty rights conferred upon Japanese companies, an analysis should be made of the wording of the substantive provision under consideration, the policy underlying that substantive provision, its history and the characteristics of the subsidiary. Accordingly, this Court should limit its decision in this case to the question whether a United States subsidiary of a Japanese company is entitled to assert the executive personnel

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[1] SPNV does not address any issues going to the merits of the present action.

choice rights of Article VIII(1) and refrain from ruling upon the vesting in subsidiaries of rights conferred by the Treaty on Japanese nationals in the many other substantive provisions of the Treaty.

ARGUMENT

The purpose of the Friendship, Commerce and Navigation Treaty of 1953, 4 U.S.T. 2063, T.I.A.S. No. 2863 ("the Japanese FCN Treaty") was to strengthen trade and commerce between the United States and Japan. To advance this purpose, the Japanese FCN Treaty defines various substantive rights and vests them in various entities.

The Japanese FCN Treaty uses a number of terms of art in identifying the entities in which it vests substantive rights in its various provisions, including "nationals", "companies of either party", "enterprises controlled by such nationals and companies" and "enterprises in which nationals and companies of either party hold an interest". The language of the various Japanese FCN Treaty provisions identifying the entity in which particular substantive rights are vested is not uniform. It varies from provision to provision and it must be assumed that the drafters acted purposefully in drafting those varying provisions.

The specific issue presented to the courts below was whether wholly owned United States subsidiaries of Japanese companies were to be treated as "companies of either party" for purposes of determining whether such subsidiaries may assert the right to engage executive personnel of their choice granted by Article VIII(1) to "companies of either party". Unfortunately, neither the Fifth nor the Second Circuit decided that specific issue. Rather, both appear to have taken the position that wholly owned United States subsidiaries of Japanese companies are to be treated as Japanese companies generally.

That, we respectfully, suggest, is an untenable and overly broad conclusion, inconsistent with many different substantive provisions of the Japanese FCN Treaty. The drafters of the Japanese FCN Treaty purposefully differentiated among the

various substantive provisions of the Treaty in identifying the entity in which the Treaty right is vested. While it may make perfectly good sense to conclude that a wholly owned United States subsidiary should be treated as a Japanese company for purposes of the "free choice" provision of Article VIII(1), it may not make any sense so to treat a United States subsidiary in the context of other substantive provisions.

Further problems arise from the fact that a foreign corporation and a U.S. entity in which it has an interest may not agree on the exercise of particular Treaty rights. These situations can and do arise even where the foreign corporation is a majority shareholder because of the obligation of the board of directors of the U.S. company to serve the interests of all of its stockholders. In such circumstances, it may become necessary to decide whether the particular right resides in the foreign parent, the U.S. company, or both. In other circumstances, vesting such rights in a U.S. subsidiary may bind the foreign parent in ways incompatible with the underlying Treaty right. Recognizing that the U.S. subsidiary can exercise certain Treaty rights does not preclude the exercise of the corresponding rights by the foreign parent where the Treaty vests such rights in the parent. Accordingly, an informed decision concerning whether to vest a Treaty right conferred upon a foreign company in its U.S. subsidiary will in many cases depend upon an analysis of the relationships between the parent and the subsidiary in the context of the particular rights involved.

CONCLUSION

The determination of whether a subsidiary is entitled to invoke the Treaty rights of its parent should depend on the underlying policies of the particular provision, and not on general definitional rules. To determine whether it is appropriate to treat a U.S. subsidiary as entitled to assert the Japanese FCN Treaty rights conferred upon Japanese companies, an analysis should be made of the wording of the provision under consideration, the policy underlying that substantive provision, its history, the characteristics of the subsidiary, and the policy that underlies the countervailing obligation against which the Treaty right is asserted. The consideration of these factors will lead to the conclusion that some Treaty provisions that refer to "companies of either party" should apply to U.S. subsidiaries, and other provisions should not. This Court should not reach out to decide issues which have not been developed in the record below. In matters of taxation, importation, nationalization and the many other subjects covered by Friendship, Commerce and Navigation Treaties, the respective rights of foreign parents and U.S. subsidiaries are at present unclear and cannot be resolved without full consideration of the particular substantive rights involved and the factual situations in which those rights are asserted. Accordingly, SPNV respectfully suggests that the Court limit its ruling to the question whether a United States subsidiary wholly owned by a Japanese company may assert the right to engage executive personnel of its choice conferred by Article VIII(1) of the Japanese FCN Treaty.

Respectfully submitted,

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